Nos. 78-17 and 78-249

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

BILLY J. MCCOMBS, ET AL.

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

BILLY J. MCCOMBS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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In this case the court of appeals held that respondents' predecessors had lawfully abandoned a certificated service in natural gas under Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), when they terminated delivery in 1966, even though they never applied to the Commission for abandonment, the Commission never authorized abandonment, and it is undisputed that the supply of gas is not depleted.

Respondents, opposing the petitions for a writ of certiorari, contend (1) that previous decisions establish that the Commission and the courts may deem an abandonment application to have been effectively filed and granted at some previous time where the person who should have filed the application at that time but failed to do so acted in good faith (Br. in Opp. 8-9), and (2) that the failure to file in this case was in good faith (Br. in Opp. 9-12). Those contentions are incorrect.

The cases cited by respondents (Br. in Opp. 8)[1] did not involve abandonment under Section 7(b) and have no bearing on this case. In *Plaquemines* (note 1, *supra*), the Commission had asserted jurisdiction over the producer's sales in 1961, but the producer had failed to apply for a certificate authorizing the sales until 1966. The Commission held that the sales from 1961 to 1966 were subject to Commission rate regulation, and to possible refund orders, as if the producer had applied in 1961 as required. The court of appeals affirmed on the principle that (450 F. 2d at 1337-1338):

> The Commission, in acting upon applications for certification filed some time after Commission jurisdiction was asserted * * * has the equitable power "to regard as being done that which should have been done" by recreating the past, insofar as

[1] *Plaquemines Oil and Gas Co.* v. *Federal Power Commission*, 450 F. 2d 1334 (D.C. Cir. 1971); *Highland Resources Inc.* v. *Federal Power Commission*, 537 F. 2d 1336 (5th Cir. 1976); and *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, 379 F. 2d 153 (D.C. Cir 1967).

> is reasonably possible, to reflect compliance with the Act and to order refunds to be paid if necessary to achieve that goal.[2]

The same principle was applied in *Niagara Mohawk* (note 1, *supra*), where a utility had built hydro-electric projects for which it should have sought Commission licenses in 1941 and 1949, but did not apply for the licenses until 1962. Because calculation of administrative charges depended on the date the licenses were granted, the Commission in 1964 issued the licenses with effective dates of 1941 and 1949. The court approved the Commission's actions as simply imposing "a condition that puts the wrongdoer in no worse stance than the company that has punctiliously observed the requirements of law * * *." 379 F. 2d at 159.

Thus, *Plaquemines* and *Niagara Mohawk* stand for the proposition that where a party has taken action without seeking the required authorization from the Commission, the Commission may fashion a remedy on the basis of the assumption that authorization was sought and obtained at the proper time, in order to prevent the party from benefiting from its failure to comply with the statutory requirements.[3] Nothing in either case supports the claim

[2] The court remanded the case with respect to certain refunds the Commission had ordered on the ground that the Commission had apparently not applied the general principle to those refunds. 450 F. 2d at 1338-1341.

[3] *Highland Resources*, note 1, *supra*, although not involving precisely the same principle, is also inapposite here. In that case a producer failed to file an application for increased rates prior to a Commission-established deadline, in good-faith reliance on Commission pronouncements that a producer in its position did not have to file. In those circumstances the court of appeals held that the Commission should treat the producer's late-filed application as if it had been filed in time. 537 F. 2d at 1338-1339. In contrast, the

that a court may retroactively authorize the abandonment of dedicated service when the producer has failed to seek or obtain the required Commission approval. Indeed, the principle of these cases—that a party may not evade the obligations of the Act by failing to comply with its procedural requirements—supports our position. Contrary to that principle, the decision of the court of appeals here rewards respondents for the failure to comply with the requirements of Section 7(b).

Respondents' further contention that their predecessor Haring's failure to file for abandonment was in good faith is refuted by, among other things, the undisputed fact (see Br. in Opp. 6) that the Commission, on two occasions, informed Haring that an abandonment application was required.[4]

Commission here never informed respondents' predecessors that no abandonment application needed to be filed; rather, it twice informed them that abandonment applications did have to be filed.

[4]Respondents' assertion (Br. in Opp. 9) that "[t]he *only* evidence concerning the facts existing in 1966" indicated that the supply of gas was depleted overlooks the fact that, if abandonment had been sought and a hearing conducted by the Commission as required by Section 7(b), the facts adduced in evidence might have revealed the existence of the substantial reserves that were subsequently discovered. Indeed, this case illustrates the importance of the procedures established by Section 7(b) in ensuring that abandonment does not depend on the producer's unilateral determination of the facts.

For the foregoing reasons and the reasons set forth in our petition for a writ of certiorari, it is respectfully submitted that the petition should be granted.

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